Supreme Court, U.S.
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No.

# In the Supreme Court of the United States

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WYETH LLC, ET AL., PETITIONERS

*v.*

SANDRA KIRKLAND, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether, under the doctrine of fraudulent misjoinder, a federal court should retain jurisdiction over a removed action where claims by non-diverse plaintiffs have been improperly joined with claims by diverse plaintiffs.

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Wyeth LLC; Wyeth Pharmaceuticals Inc.; Pfizer Inc.; Pharmacia Corporation; Pharmacia & Upjohn Company LLC; Greenstone LLC; Barr Laboratories, Inc.; Mead Johnson & Company; Novartis Pharmaceuticals Corporation; Solvay Pharmaceuticals, Inc.; and Watson Laboratories, Inc.

Petitioner Pfizer Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioners Wyeth LLC; Wyeth Pharmaceuticals Inc.; Pharmacia Corporation; Pharmacia & Upjohn Company LLC; and Greenstone LLC are direct or indirect subsidiaries of Pfizer Inc. Petitioner Wyeth LLC is wholly owned by Pfizer Inc.; petitioner Wyeth Pharmaceuticals Inc. is wholly owned by Wyeth LLC. Petitioner Pharmacia Corporation is wholly owned by Pfizer Inc.; petitioner Pharmacia & Upjohn Company LLC is wholly owned by Pharmacia & Upjohn LLC, which is wholly owned by Pharmacia Corporation; and petitioner Greenstone LLC is wholly owned by Pharmacia & Upjohn Company LLC.

Petitioner Barr Laboratories, Inc., is an indirect wholly owned subsidiary of Barr Pharmaceuticals, LLC, formerly known as Barr Pharmaceuticals, Inc. Barr Pharmaceuticals, LLC, is a privately held, wholly owned subsidiary of Teva Pharmaceuticals USA, Inc., and an indirect wholly owned subsidiary of Teva Pharmaceutical Industries Ltd., a publicly held company. Teva Pharmaceutical Industries Ltd. has no parent corporation, and, to the best of its knowledge, no publicly held company owns 10% or more of its stock.

Petitioner Mead Johnson & Company is now known as Mead Johnson & Company, LLC, and is wholly owned

by Mead Johnson Nutrition Company, a publicly held company. Mead Johnson Nutrition Company has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner Novartis Pharmaceuticals Corporation is indirectly wholly owned by Novartis AG, a publicly held company. Intervening subsidiaries are Novartis Finance Corporation, Novartis Corporation, and Novartis Holding AG. Novartis AG has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner Solvay Pharmaceuticals, Inc., is now known as Abbott Products, Inc. It is wholly owned by Abbott Pharma U.S. Holdings, Inc., and indirectly wholly owned by Abbott Laboratories Inc., a publicly held company. Abbott Laboratories Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner Watson Laboratories, Inc., is wholly owned by Watson Pharmaceuticals, Inc., a publicly held company. Watson Pharmaceuticals, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondents are Sandra Kirkland; Dorothy Allen; Judith Allen; Patsy Anderson; Loretta Andrews; Janet Arbogast; Helen Penny Aros; Karen Awald; Carol Bannerman; Phyllis Barnes; Joanne Barrett; Betty Bethea; Joanne Black; Mary Bowden; Juanita Brouwer; Hazel Burgess; Joyce Burpee; Virginia Campbell; Nata Cargan; Adrianne Carrera; Lois Carter; Nancy Jo Carter; Joan Casto; Margaret Chamness; Mary Chrisco; Peggy Clemons; Sally Collins; Marian Conner; Alba Cordon; Barbara Couch; Wilma Cowart; Mary Dawson; Lois Duffy; Linda Eells; Janet Edwards; Frances Farr; Wilma Faulkner; Patricia Fernau; Marjorie Flaman; Margaret Foltz; Wanda Foltz; Delois Foster; Isabel Fragoso; Jo

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## PETITION FOR A WRIT OF CERTIORARI

Wyeth LLC; Wyeth Pharmaceuticals Inc.; Pfizer Inc.; Pharmacia Corporation; Pharmacia & Upjohn Company LLC; Greenstone LLC; Barr Laboratories, Inc.; Mead Johnson & Company; Novartis Pharmaceuticals Corporation; Solvay Pharmaceuticals, Inc.; and Watson Laboratories, Inc., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 591 F.3d 613. The district court's orders denying respondents' motions to remand (App., *infra*, 23a-29a, 30a-35a, 36a-42a) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on January 6, 2010. A petition for rehearing was denied on March 16, 2010 (App., *infra*, 21a-22a). On June 3, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including July 14, 2010, and on June 30, 2010, he further extended the time to and including August 13, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES AND RULE INVOLVED

The federal diversity statute, 28 U.S.C. 1332; the federal removal statute, 28 U.S.C. 1441; and Federal Rule of Civil Procedure 20 are reproduced in relevant part in the appendix to this petition (App., *infra*, 43a-44a).

## STATEMENT

A total of 123 plaintiffs (including respondents) brought three lawsuits against defendants (including petitioners) in Minnesota state court, alleging that defendants had inadequately warned them of the risk of breast cancer associated with defendants' prescription medicines. All but seven of the plaintiffs were diverse to the defendants against which they asserted their claims. Defendants removed the actions to federal court; plaintiffs moved to remand the actions on the ground that complete diversity did not exist. Defendants contended that the federal district court should retain jurisdiction because the claims of the non-diverse plaintiffs had been improperly joined. The district court denied plaintiffs' motions to remand, except for the claims of the non-diverse plaintiffs, and dismissed the claims of the diverse plaintiffs as duplicative of claims already pending before that court. App., *infra*, 23a-29a, 30a-35a, 36a-42a. The court of appeals reversed and remanded. *Id.* at 1a-20a.

1. Petitioners produce medicines colloquially known as "hormone therapy," which have been prescribed for many decades to treat the symptoms of menopause and to prevent osteoporosis. For much of that time, there has been extensive scientific investigation and debate as to whether there is a link between hormone therapy and breast cancer. In 2002, a study by the Women's Health Initiative reported that women who used one form of hormone therapy were relatively more likely to develop breast cancer than women in the control group. In the wake of that study, numerous women who used hormone therapy and developed breast cancer filed suit against petitioners and other producers of hormone-therapy medicines, contending, *inter alia*, that the producers had inadequately warned of the risk of breast cancer. App., *infra*, 5a; Pet. C.A. Br. 2.

This case involves three of those lawsuits, all of which were brought in Minnesota state court. In the first action, 57 plaintiffs from 27 different States brought suit against 11 defendants. Only three of the plaintiffs asserted claims against a defendant from the same State and were thus "non-diverse." In the second action, six plaintiffs from six different States (suing through a single executor) brought suit against six defendants; only one was non-diverse. And in the third action, 60 plaintiffs from 25 different States brought suit against eight defendants; only three were non-diverse. Notably, all of the diverse plaintiffs had already brought suit against the same defendants in federal court; their litigation in Minnesota state court was therefore duplicative. App., *infra*, 5a-6a, 27a, 34a, 40a.

Defendants (including petitioners) removed the actions to the United States District Court for the District of Minnesota. Plaintiffs (including respondents) moved to remand the actions to state court, on the ground that

complete diversity did not exist between plaintiffs and defendants. Defendants contended that, under the doctrine of "fraudulent misjoinder," federal jurisdiction could not be defeated by joining non-diverse plaintiffs whose claims did not arise out of the same transaction or occurrence and present a common question of law or fact (and therefore could not be joined under Federal Rule of Civil Procedure 20(a)). The Judicial Panel on Multidistrict Litigation subsequently transferred the actions to the Eastern District of Arkansas. App., *infra*, 6a-7a.

2. In three materially identical orders, the district court denied plaintiffs' motions to remand (except as to those few plaintiffs who asserted claims against non-diverse defendants). App., *infra*, 23a-29a, 30a-35a, 36a-42a.

At the outset, the district court noted that "multi-plaintiff and multi-defendant pleadings are nothing new to [multidistrict] litigation." App., *infra*, 24a. The court observed that "these multi-plaintiff complaints are oft criticized" on the ground that "the non-diverse plaintiff is typically misjoined for the sole purpose of defeating diversity." *Ibid.*

The district court reasoned that, "[e]ven if a non-diverse plaintiff has a valid cause of action against a defendant, that plaintiff may not prevent removal based on diversity of citizenship if there is no reasonable basis for the joinder of the non-diverse plaintiff with the other plaintiffs." App., *infra*, 25a (brackets, internal quotation marks, and citation omitted). The court rejected the contention that, under Rule 20(a), "[plaintiffs'] claims arise out of the same transaction or occurrence and there are common questions of law and fact." *Ibid.* The court noted that "[p]laintiffs are residents of different [S]tates and were prescribed different [hormone-therapy] drugs by different doctors, for different lengths of time, in dif-

ferent amounts, and they suffered different injuries." *Id.* at 25a-26a. The court added that it "c[ould] see no reason for the joinder of the non-diverse plaintiffs other than to defeat diversity jurisdiction." *Id.* at 26a. Because all 116 of the diverse plaintiffs already had claims pending in other actions before the same court, the district court dismissed the claims of those plaintiffs and, pursuant to Rule 21, remanded the claims of the seven non-diverse plaintiffs to state court. *Id.* at 28a-29a.

3. Plaintiffs in all three actions appealed. In a consolidated opinion, the court of appeals reversed and remanded. App., *infra*, 1a-20a.

To begin with, the court of appeals noted that "[c]ourts ha[d] long recognized fraudulent joinder as an exception to the complete diversity rule," which occurs when "a plaintiff files a frivolous or illegitimate claim against a non-diverse defendant solely to prevent removal." App., *infra*, 11a-12a. The court of appeals further noted that courts had more recently recognized the doctrine of fraudulent *misjoinder*, which occurs when "a plaintiff sues a diverse defendant in state court and joins a viable claim involving a nondiverse party * * * even though the plaintiff has no reasonable procedural basis to join them in one action because the claims bear no relation to each other." *Id.* at 12a-13a (citation omitted).

Assuming the validity of the doctrine of fraudulent misjoinder, the court of appeals held that it was inapplicable here because "the plaintiffs' alleged misjoinder in this case [was] not so egregious as to constitute fraudulent misjoinder." App., *infra*, 15a-16a. The court determined that "the manufacturers have not met their burden of establishing that plaintiffs' claims are egregiously misjoined," *id.* at 17a, and further determined that "the manufacturers have presented no evidence that the plaintiffs joined their claims to avoid diversity jurisdic-

tion" or "acted with bad faith," *id.* at 18a, 19a. Although the court suggested that "there may be a palpable connection between the plaintiffs' claims against the manufacturers as they all relate to similar drugs and injuries and the manufacturers' knowledge of the risks of [hormone-therapy] drugs," *id.* at 18a, the court ultimately stated that it was "mak[ing] no judgment on whether the plaintiffs' claims are *properly* joined under Rule 20." *Id.* at 19a. Instead, the court emphasized that the relevant inquiry was whether "the joinder is so egregious and grossly improper" as to warrant application of the fraudulent-misjoinder doctrine. *Ibid.* The court concluded that, "absent evidence that plaintiffs' misjoinder borders on a 'sham,'" application of the fraudulent-misjoinder doctrine was improper. *Id.* at 20a.

4. The court of appeals denied petitioners' petition for rehearing. Chief Judge Loken would have granted rehearing en banc. App., *infra*, 21a-22a.

## REASONS FOR GRANTING THE PETITION

This case involves a question of considerable practical significance that will only rarely reach the Court. In the decision below, the court of appeals held that the doctrine of "fraudulent misjoinder," which permits a federal court to retain jurisdiction over a removed action where the claims of non-diverse plaintiffs have been improperly joined, is applicable only where the misjoinder was "egregious." The lower courts are in disarray on the issue whether improper joinder is sufficient to sustain federal jurisdiction absent an additional showing of egregiousness—and, indeed, on the broader issue whether improper joinder is a basis for federal jurisdiction at all. Because of the statutory limitation on appellate jurisdiction over remand decisions, however, those issues hardly ever reach the courts of appeals, much less this Court.

In the decision below, the court of appeals erred by requiring a defendant to show that any misjoinder was not only improper, but egregiously so—a requirement that would render the doctrine of fraudulent misjoinder a virtual nullity and undermine the important interests that the doctrine serves. The Court should take this rare opportunity to clarify the validity and scope of the fraudulent-misjoinder doctrine, and grant review of the court of appeals' erroneous decision.

### A. The Lower Courts Are In Disarray On The Validity And Scope Of The Doctrine Of Fraudulent Misjoinder

1. The federal removal statute permits defendants to remove any action filed in state court "of which the district courts of the United States have original jurisdiction," including actions involving diversity of citizenship. 28 U.S.C. 1441(a). The federal diversity statute, in turn, has long been construed to require complete diversity: *i.e.*, that all of the plaintiffs in an action be diverse to all of the defendants. See *Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806). In the ordinary course, therefore, "the presence in the action of a single plaintiff from the same State as a single defendant deprives the district court of original diversity jurisdiction over the entire action." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 553 (2005).

At the same time, this Court has observed that "the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court." *Wecker* v. *National Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907). Consistent with that observation, lower courts have long recognized that the complete-diversity rule is subject to judicially crafted exceptions to avoid the potential for

abuse. Perhaps the best established of those exceptions is the doctrine of "fraudulent joinder," under which a federal court may disregard the existence of a non-diverse defendant if it concludes that the plaintiff does not have a valid claim against that defendant—even if the claim indisputably arises out of the same transaction or occurrence as a valid claim against a diverse defendant. See, *e.g.*, *Schur* v. *L.A. Weight Loss Centers, Inc.*, 577 F.3d 752, 763 (7th Cir. 2009). All of the regional courts of appeals have recognized the existence of that doctrine. See Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 Ala. L. Rev. 779, 791 & n.64 (2006) (Hines & Gensler) (citing cases).

2. This case involves the doctrine of "fraudulent misjoinder," which is analogous to, but conceptually distinct from, the doctrine of fraudulent joinder. Whereas the doctrine of fraudulent joinder seeks to prevent a plaintiff from avoiding federal diversity jurisdiction by asserting an invalid claim against a non-diverse defendant, the doctrine of fraudulent *misjoinder* seeks to prevent a plaintiff from avoiding federal diversity jurisdiction by asserting a valid but substantially unrelated (and therefore improperly joined) claim. Fraudulent misjoinder may occur in one of two ways. First, a valid claim by a plaintiff against a diverse defendant may be joined with a valid but substantially unrelated claim by the same plaintiff against a non-diverse defendant. Second, as in this case, a valid claim by one plaintiff against a diverse defendant may be joined with a substantially unrelated claim by another plaintiff against a non-diverse defendant. In both cases, complete diversity is destroyed, thus potentially preventing removal of the action to federal court.

The leading case on the doctrine of fraudulent misjoinder is *Tapscott* v. *MS Dealer Service Corp.*, 77 F.3d 1353 (11th Cir. 1996). In that case, an Alabama plaintiff originally asserted fraud claims against four defendants, one of which was an Alabama resident, arising from the sale of service contracts on *automobiles*. *Id.* at 1355. In an amended version of the complaint, two additional Alabama plaintiffs asserted fraud claims against a North Carolina defendant arising from the sale of extended service contracts on *retail products*. *Ibid.* The North Carolina defendant removed the action, despite the absence of complete diversity, on the ground that the claims against it were unrelated to the original claims involving the non-diverse defendant. *Ibid.* The district court denied the plaintiffs' motion to remand, and the Eleventh Circuit affirmed. *Ibid.* The Eleventh Circuit observed that "[m]isjoinder may be just as fraudulent as the joinder of a resident defendant against whom a plaintiff has no possibility of a cause of action." *Id.* at 1360. The court, however, refused to hold that "mere misjoinder" was sufficient to sustain federal jurisdiction. *Ibid.* Instead, the Eleventh Circuit agreed with the district court that "[the plaintiffs'] attempt to join these parties [was] so egregious as to constitute" fraudulent misjoinder. *Ibid.*

Citing *Tapscott*, two other courts of appeals have since recognized the doctrine of fraudulent misjoinder, though neither ultimately applied it to uphold a defendant's removal. See *In re Benjamin Moore & Co.*, 318 F.3d 626, 630-631 (5th Cir. 2002) (noting the "*Tapscott* principle" that "fraudulent misjoinder of plaintiffs is no more permissible than fraudulent misjoinder of defendants to circumvent diversity jurisdiction"); *California Dump Truck Owners Ass'n* v. *Cummins Engine Co.*, 24 Fed. Appx. 727, 729 (9th Cir. 2001) (noting that, under

*Tapscott*, the doctrine of fraudulent misjoinder was applicable where "the claims of non-diverse plaintiffs have no real connection or nexus to the claims of the diverse plaintiffs"). No court of appeals has rejected the doctrine, and for good reason: Like the doctrine of fraudulent joinder, the doctrine of fraudulent misjoinder prevents a plaintiff from subverting a defendant's right to removal through "joinder gamesmanship." Hines & Gensler 780; see also E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 Harv. J.L. & Pub. Pol'y 569, 573 (2006) (explaining that the doctrine of fraudulent misjoinder is "necessary to protect a diverse defendant's statutory right to remove").

3. Since the Eleventh Circuit's decision in *Tapscott*, lower courts have taken three different positions on the validity and scope of the fraudulent-misjoinder doctrine. The Eighth Circuit in this case, like the Eleventh Circuit in *Tapscott*, suggested that the doctrine was applicable only where a defendant could show that the joinder in question was not merely improper, but "egregiously" so. App., *infra*, 16a, 18a, 19a; see *Tapscott*, 77 F.3d at 1360. Numerous district courts have adopted that "misjoinder-plus" approach to the fraudulent-misjoinder doctrine. See, *e.g.*, *Lam* v. *Mid-Century Ins. Co.*, Civ. No. 08-4413, 2008 WL 5120052, at *3 (N.D. Cal. Dec. 3, 2008); *Jackson* v. *Truly*, 307 F. Supp. 2d 818, 823-824 (N.D. Miss. 2004); *Burrell* v. *Ford Motor Co.*, 304 F. Supp. 2d 883, 888 (S.D. Miss. 2004); *Conk* v. *Richards & O'Neil, LLP*, 77 F. Supp. 2d 956, 971 (S.D. Ind. 1999); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, Civ. No. 98-20478, 1999 WL 554584, at *3 (E.D. Pa. July 16, 1999).

Other courts have held that federal jurisdiction over a removed action is appropriate as long as claims that

would otherwise destroy complete diversity have been improperly joined, without any additional requirement that the misjoinder be "egregious." See, *e.g.*, *Hughes* v. *Sears, Roebuck & Co.*, Civ. No. 09-93, 2009 WL 2877424, at *4-*5 (N.D. W. Va. Sept. 3, 2009); *Asher* v. *Minnesota Mining & Mfg. Co.*, Civ. No. 04-522, 2005 WL 1593941, at *7 n.2 (E.D. Ky. June 30, 2005); *Greene* v. *Wyeth*, 344 F. Supp. 2d 674, 685 (D. Nev. 2004); *Grennell* v. *Western Southern Life Ins. Co.*, 298 F. Supp. 2d 390, 396-397 (S.D. W. Va. 2004); *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 146-148 (S.D.N.Y. 2001). In applying that standard in *Rezulin*, Judge Kaplan expressly stated that he was "tak[ing] another path" from the courts that "have applied *Tapscott*'s egregiousness standard." *Id.* at 147-148.

Courts in a third group have gone even further than the courts requiring "egregiousness" and have rejected the doctrine of fraudulent misjoinder altogether. See, *e.g.*, *Palmer* v. *Davol, Inc.*, Civ. Nos. 07-1842 & 08-2499, 2008 WL 5377991, at *4 (D.R.I. Dec. 23, 2008); *Geffen* v. *General Electric Co.*, 575 F. Supp. 2d 865, 871 (N.D. Ohio 2008); *Robinson* v. *Ortho-McNeil Pharm., Inc.*, 533 F. Supp. 2d 838, 842 (S.D. Ill. 2008). As one of those courts explained, "[c]onducting fraudulent misjoinder analysis in this case necessarily requires the [c]ourt to wade into a thorny thicket of unsettled law; disagreements exist as to numerous questions about the doctrine, and the last thing the federal courts need is more procedural complexity." *Geffen*, 575 F. Supp. 2d at 871 (internal quotation marks and citation omitted).

4. To be sure, there is no clear conflict among the courts of appeals concerning the validity or scope of the fraudulent-misjoinder doctrine. While the absence of such a conflict would ordinarily weigh against this Court's review, it is not a substantial consideration here

because of the difficulty in obtaining appellate review of a district court decision on fraudulent misjoinder.

As a general rule, "[a]n order remanding a case to the State court from which it is removed is not reviewable on appeal." 28 U.S.C. 1447(d). Accordingly, where a district court concludes that the fraudulent-misjoinder doctrine does not apply, there will be no opportunity for a court of appeals to review that decision and to express an opinion on the doctrine's validity and scope. See, *e.g.*, *Anderson* v. *Bayer Corp.*, 610 F.3d 390, 394-395 (7th Cir. 2010) (refusing on jurisdictional grounds to consider a challenge to the application of the fraudulent-misjoinder doctrine).

Conversely, where a district court concludes that the fraudulent-misjoinder doctrine *does* apply (and retains jurisdiction on that basis), the resulting order denying remand will not be appealable as of right, because it is interlocutory. See 28 U.S.C. 1291. As a result, except in the unusual circumstance in which the district court certifies the issue for interlocutory review and the court of appeals exercises its discretion to consider it, the court of appeals will have no immediate opportunity to review the district court's decision. See 28 U.S.C. 1292(b); cf. *Tapscott*, 77 F.3d at 1356 n.4 (considering, on a Section 1292(b) petition, a challenge to the application of the fraudulent-misjoinder doctrine).[1]

If the Court does not grant review in this case, therefore, it is far from clear when the Court will next have the opportunity to consider issues concerning the validi-

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[1] In this case, respondents were able to obtain appellate review because the district court dismissed their claims as duplicative of claims already pending before that court—thereby rendering its decision final. See App., *infra*, 29a, 35a, 41a.

ty and scope of the fraudulent-misjoinder doctrine. In light of the widespread confusion among the lower courts on those issues, further review is warranted here.

**B. The Court Of Appeals' Decision Is Erroneous**

1. The Eighth Circuit primarily erred in holding that the doctrine of fraudulent misjoinder is applicable only where the misjoinder was "egregious." See App., *infra*, 16a, 18a, 19a. There is no valid basis for that requirement.

The Eighth Circuit adopted the "egregiousness" requirement from the Eleventh Circuit's decision in *Tapscott*. In that case, the court correctly recognized that "[m]isjoinder may be just as fraudulent as the joinder of a resident defendant against whom a plaintiff has no possibility of a cause of action." 77 F.3d at 1360. The court critically erred, however, by viewing fraudulent misjoinder as merely a species of fraudulent *joinder*, rather than as a discrete exception to the complete-diversity rule. See *ibid.*

A defendant who invokes the fraudulent-joinder doctrine is required to show that the claim against a non-diverse defendant is wholly lacking in merit. See, *e.g.*, *Hartley* v. *CSX Transp., Inc.*, 187 F.3d 422, 424 (4th Cir. 1999) (holding that the defendant "must show that the plaintiff cannot establish a claim even after resolving all issues of law and fact in the plaintiff's favor"); *Pampillonia* v. *RJR Nabisco, Inc.*, 138 F.3d 459, 461 (2d Cir. 1998) (explaining that the defendant must show "by clear and convincing evidence * * * that there is no possibility, based on the pleadings, that [the] plaintiff can state a cause of action"). In the context of fraudulent joinder, that heavy burden is understandable, because the court is being asked to pass on the *merits* of the underlying claim—and, once the court does so, its decision

has preclusive effect. See, *e.g.*, *Carey* v. *Sub Sea Int'l, Inc.*, 121 F. Supp. 2d 1071, 1074-1075 (E.D. Tex. 2000), aff'd, 285 F.3d 347 (5th Cir. 2002).

In the context of fraudulent misjoinder, however, the court is being asked to address only the *relatedness* of the joined claims. There is no need for the court to err on the side of caution, because a determination of fraudulent misjoinder merely resolves a procedural issue and commits the non-diverse claims to state court—which is precisely where those claims would have been heard if they had not been improperly joined in the first place. See *Rezulin*, 168 F. Supp. 2d at 147-148. For that reason, fraudulent misjoinder is best understood as a distinct exception to the complete-diversity rule, and there is no justification for requiring a defendant invoking that doctrine to bear a comparably heavy burden to that borne by a defendant invoking the fraudulent-joinder doctrine.

In addition, a rule that requires a defendant to establish that the joinder is "egregious" in order to invoke the doctrine of fraudulent misjoinder not only would impose an impossibly high burden, but would be extremely difficult to administer. Neither the Eighth Circuit in this case, nor any other court that has applied the "egregiousness" requirement, has elaborated on that requirement's meaning. For its part, the Eleventh Circuit in *Tapscott* held, without explanation, that the case involved more than "mere misjoinder" and that the circumstances were "so egregious" as to warrant application of the doctrine. 77 F.3d at 1360. District courts following *Tapscott* have done no better. One court cited *Tapscott* for the proposition that, in order to constitute fraudulent misjoinder, the misjoinder must be "totally unsupported." *Burrell*, 304 F. Supp. 2d at 888. But it is unclear what it means to distinguish "totally unsup-

ported" misjoinder from "mere" misjoinder; either the claims at issue are sufficiently related to support joinder (because they arise out of the same transaction or occurrence and present a common question of law or fact) or they are not.

2. The Eighth Circuit compounded its error in this case by suggesting that the "egregiousness" requirement could be satisfied where the defendant could show that the plaintiffs had "acted with bad faith" in joining the non-diverse claims. App., *infra*, 19a. As a preliminary matter, that is a novel gloss on the "egregiousness" requirement; in *Tapscott*, the court did not probe the subjective intent of the plaintiffs in joining the relevant claims.

But in any event, framing the "egregiousness" requirement in terms of the "bad faith" of the plaintiffs would not alleviate the difficulties in administering the requirement; indeed, it would exacerbate them. As one court has explained, "[a]dding what would be in essence a state-of-mind element to the procedural misjoinder inquiry would overly complicate what should be a straightforward jurisdictional examination." *Burns* v. *Western Southern Life Ins. Co.*, 298 F. Supp. 2d 401, 403 (S.D. W. Va. 2004); see Hines & Gensler 820 n.216 (explaining that a "subjective inquiry into the plaintiffs' state of mind" would be a "problematic exercise at best"). It is far from clear how a defendant could even procure "evidence that plaintiffs' misjoinder borders on a 'sham,'" as the Eighth Circuit's decision evidently requires, short of deposing plaintiffs' counsel (assuming that were even permitted)—much less do so within the short time contemplated for removal. App., *infra*, 20a; see 28 U.S.C. 1446(b). Accordingly, even courts applying the fraudulent-joinder doctrine have generally refrained from inquiring into the plaintiff's motive, and other

courts applying the fraudulent-misjoinder doctrine have done likewise. See *Asher*, 2005 WL 1593941, at *7 n.2; cf. *Chicago, R.I. & P. R. Co.* v. *Dowell*, 229 U.S. 102, 113 (1913) (noting that "the mere averment that a particular defendant had been joined for the fraudulent purpose of defeating the right of removal which would otherwise exist is not in law sufficient").

3. Because it applied the "egregiousness" requirement, the Eighth Circuit made no effort to determine whether joinder of plaintiffs' claims was proper in the first place. Although the court acknowledged that "[i]t may be that the plaintiffs' claims are not properly joined," it expressly stated that it was not deciding the issue. App., *infra*, 19a.

As the district court determined, however, it is clear that the joinder in this case was improper—and therefore that, under the correct understanding of the fraudulent-misjoinder doctrine, federal jurisdiction over the claims of the diverse plaintiffs was appropriate. In each of the three underlying lawsuits, the vast majority of plaintiffs were diverse to the defendants against which they asserted their respective claims; of the 123 plaintiffs, only seven were non-diverse. The only feature shared by the diverse and non-diverse plaintiffs was that, at some point over a 13- to 28-year period, each of them had taken some form of hormone therapy. But the critical point, as the district court found, is that different plaintiffs had taken different medicines (produced by different manufacturers and with different chemical compositions and warnings). See App., *infra*, 25a-26a.

Courts have consistently held that the joinder of even less disparate claims is improper. In *Rezulin*, for example, Judge Kaplan retained jurisdiction over the claims of diverse plaintiffs, even though the plaintiffs (unlike plaintiffs here) had all taken the *same* medicine, on the

ground that the plaintiffs had not alleged that they "received [the medicine] from the same source or that they were exposed to [it] for similar periods of time." 168 F. Supp. 2d at 146; see *In re Rezulin Prods. Liab. Litig.*, Civ. No. 00-2843, 2002 WL 31496228, at *1 (S.D.N.Y. Nov. 7, 2002) (similarly concluding that misjoinder had occurred where the plaintiffs "do not allege that they received [the medicine] from the same source, that they were exposed for similar periods of time, or that they suffered similar injuries, if any"). Likewise, in *Diet Drugs*, where the plaintiffs again had all taken the same medicines, the court retained jurisdiction after noting that the plaintiffs "ha[d] not purchased or received [the medicines] from an identical source, such as a physician [or] hospital." 1999 WL 554584, at *4. The court added that the plaintiffs' "vast geographic diversity" and "lack of reasonable connection to each other" supported its conclusion. *Id.* at *3. Courts have reached the same conclusion in numerous other cases. See, *e.g.*, *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 651 (S.D. Tex. 2005); *Greene*, 344 F. Supp. 2d at 684; *Simmons* v. *Wyeth Labs., Inc.*, Civ. Nos. 96-6631, 96-6686, 96-6728 & 96-6730, 1996 WL 617492, at *4 (E.D. Pa. Oct. 24, 1996); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL No. 1014, 1995 WL 428683, at *2 (E.D. Pa. July 17, 1995).

The rationale of those decisions applies *a fortiori* here. The district court correctly recognized that, in each of the three underlying lawsuits, plaintiffs "were prescribed different [hormone-therapy] drugs by different doctors, for different lengths of time, in different amounts, and they suffered different injuries." App., *infra*, 25a-26a. Based on that assessment, the court correctly concluded that plaintiffs could not satisfy either of the conjunctive requirements for joinder under Rule 20(a), because their claims neither arose out of the same

transaction or occurrence nor presented a common question of law or fact. *Id.* at 25a. And the district court correctly dismissed the claims of the diverse plaintiffs as duplicative of claims already pending before that court. *Id.* at 28a-29a.

Because it is beyond dispute that the joinder in this case was improper, the choice of the appropriate standard for fraudulent misjoinder would be outcome-dispositive here. This case therefore constitutes a suitable vehicle in which to clarify the scope of that doctrine and to reject the Eighth Circuit's erroneous "misjoinder-plus" approach.

### C. The Question Presented Is Exceptionally Important And Merits The Court's Review In This Case

Finally, the question presented in this case—*viz.*, whether fraudulent misjoinder requires more than a showing of "mere misjoinder"—is an exceptionally important one. This case presents a rare opportunity for the Court to address and resolve that question.

1. The fraudulent-misjoinder doctrine is essential to ensure the proper operation of the federal removal and diversity statutes. This Court has long warned that "[f]ederal courts may, and should, take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals." *Alabama Great Southern R. Co.* v. *Thompson*, 200 U.S. 206, 218 (1906). Under the well-established fraudulent-joinder doctrine, a plaintiff may not defeat a defendant's statutory right to remove a case to federal court by asserting an invalid claim against a non-diverse defendant. There is no principled basis for a different outcome where the plaintiff seeks to defeat the right to removal by joining a substantially unrelated claim by another plaintiff against a non-diverse

defendant. See Hines & Gensler 780 (describing the phenomenon of "[p]laintiffs who have never met—indeed, who often live halfway across the country from one another— * * * teaming up to sue in state court"). This Court should make clear that such a pernicious form of "joinder gamesmanship," *ibid.*, is not permitted.

2. The fraudulent-misjoinder doctrine is particularly essential to ensure the proper operation of the federal statute governing multidistrict litigation. That statute provides for the consolidation of cases that may not qualify for class treatment but would benefit from the coordinated conduct of common pretrial activity such as discovery and dispositive motions practice. See 28 U.S.C. 1407(a). Multidistrict litigation is especially useful in the mass tort context, including pharmaceutical litigation of the type at issue here, where the vast majority of plaintiffs are likely to be diverse from the defendant. See, *e.g.*, *In re 'Agent Orange' Prod. Liab. Litig.*, 304 F. Supp. 2d 404, 416 (E.D.N.Y. 2004) (Weinstein, J.).

Only those actions that are properly in *federal* court, however, may be consolidated under the federal multidistrict litigation statute. See 28 U.S.C. 1407(a). Accordingly, if an action remains in (or is remanded to) state court, all of the benefits of the multidistrict litigation statute would be lost, because the parties would have to conduct duplicative discovery and motions practice in federal and state court. If the doctrine of fraudulent misjoinder is properly applied, it would prevent such jurisdictional "spoilers" from hindering the efficient functioning of the multidistrict litigation statute. Conversely, if the doctrine is narrowed or abandoned altogether, plaintiffs could effectively opt out of the multidistrict litigation process simply by joining their claims with the unrelated claims of non-diverse plaintiffs.

This case well illustrates that concern. As of September 30, 2009, more than 8,000 separate cases alleging claims against hormone-therapy manufacturers had been transferred to the Eastern District of Arkansas under the multidistrict litigation statute; at last report, more than 6,500 of those cases remained pending. See United States Judicial Panel on Multidistrict Litigation, Statistical Analysis of Multidistrict Litigation 35 (2009) <tinyurl.com/jpml2009>. In the seven years since hormone-therapy cases were first transferred to the Eastern District of Arkansas, that court has overseen a discovery process involving hundreds of millions of documents, rendered numerous decisions on pretrial motions, and conducted three trials on the merits. Yet because petitioners did not demonstrate that respondents' misjoinder of seven non-diverse plaintiffs was sufficiently "egregious" to satisfy the Eighth Circuit's amorphous standard, the claims of the 116 diverse plaintiffs may have to be litigated in Minnesota state court, with the resulting duplication of litigation that has already taken place and is still ongoing before the Arkansas federal court.[2]

With all due respect to the Eighth Circuit, that cannot be the law. The Eighth Circuit's restricted view of the fraudulent-misjoinder doctrine renders that doctrine a virtual nullity—and, in so doing, insufficiently protects the right to removal and impermissibly interferes with the operation of important federal statutes. Because of

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[2] The Minnesota state court recently required plaintiffs to file new complaints individually. See, *e.g.*, Case Management and Filing Order at 2, *Kirkland* v. *Wyeth*, No. 27-CV-08-18624 (Minn. Dist. Ct. June 3, 2010). Defendants are currently attempting to remove many of those individual complaints, but it is unclear at this point whether those efforts will ultimately be successful.

the difficulty in obtaining appellate review over district court decisions applying that doctrine, moreover, it may be many years before the Court has another opportunity to consider the issues presented here concerning the doctrine's validity and scope. The Court should grant review in this case to provide much-needed guidance to the lower courts on those vitally important issues.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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